**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 10 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION**: The Director, Nebraska Service Center (the director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an architectural design firm. It seeks to permanently employ the beneficiary in the United States as an architect. The petitioner requests classification of the beneficiary as a member of professional holding an advanced degree pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 4, 2010. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal, counsel submitted a brief, copies of recruitment documentation and copies of documentation already in the record.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in architecture or related.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: Any majors related to architecture.
H.8. Alternate combination of education and experience that is acceptable: Yes
H.8-A Alternate level of Education: Bachelor's degree
H.8-C Indicate number of years of experience acceptable: 5 years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months in any job related to architect.
H.14. Specific skills or other requirements: Employer will consider any suitable combination of education, experience, and training.

The labor certification also states that the beneficiary qualifies for the offered position based on a Master's degree in architecture from the completed in May 2007 and experience as a staff designer with in Dallas, Texas from July 2007 to September 26, 2010, the date on which the labor certification was signed by the beneficiary. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The record contains the beneficiary's diploma and transcripts from the , reflecting that a Master's of architecture was conferred upon the beneficiary in May 2007.

The regulation at 8 C.F.R. § 204.5(g)(1) states:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien

or of the training received.

On appeal, counsel contends that the director erred in finding that the beneficiary required 60 months of experience in an alternate position as well as a Master's degree because the petitioner intended to only request a Master's degree or, in the alternative, a Bachelor's degree with five (5) years of experience. The AAO finds that the requirements, as certified by the DOL, require an applicant to have a Master's degree plus 60 months of experience in a position related to architecture OR a Bachelor's degree plus 5 years of experience and 60 months of experience in a position related to architecture. While counsel submits evidence to establish that the petitioner advertised the proffered position by requesting a Master's degree and no other experience, the terms of the labor certification are unambiguous and cannot be ignored.

Counsel submits the Instructions for ETA Form 9089 in support of his position that section H.10 is only relevant if the job requirement is fulfilled by the application of an alternate combination of education and experience in lieu of the master's degree. Section H.8 of the Form 9089 references alternate education and experience that an employer is willing to accept in lieu of the primary requirements. Section H.8 is broken out into subsections A, B and C. Section H.10 is not related to section H.8 or any of its subsections. The Instructions for ETA Form 9089 do not support counsel's assertions.

On November 5, 2012, the AAO issued a request for evidence (RFE) requesting additional evidence of the beneficiary's experience. In response, the petitioner submitted two experience letters.

The record contains an experience letter, dated November 15, 2012, from principal human resources, on letterhead stating that the company employed the beneficiary as an architect from July 2, 2007 to August 3, 2012. This letter accounts for 37 months of relevant experience obtained prior to the priority date.

The record also contains an experience letter, dated November 27, 2012, from principal, engine force architects and CDO/architect, on letterhead stating that the company employed the beneficiary as a junior architectural designer from December 18, 2000 to April 25, 2003 and as an architectural designer from August 16, 2003 to January 17, 2004. However, the experience set forth in the letter does not appear on the labor certification. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Further, the information in the letter contradicts information set forth on the beneficiary's resume and transcripts. While the letter states that the beneficiary was employed full-time, both the resume and transcripts indicate that the beneficiary was studying for and was eventually awarded a Bachelor of Engineering and a Bachelor of Science from in February 2003. The beneficiary's commitments to obtain a Bachelor of Engineering and a Bachelor of Science during the same time the letter claims that he was employed on a full-time basis make it unlikely that the experience set forth in the letter is accurate. The beneficiary's resume also does not list the employment set forth in the letter, even though it provides details regarding his employment

from July 2, 2007 with as well as his employment with interior design studio, Seoul, South Korea, from June 3, 2002 to August 1, 2002 and with architecture and landscape architecture studio, Seoul, South Korea, from July 19, 2000 to December 29, 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Finally, a review of company website reveals that was not established until April 3, 2011, more than 10 years after the beneficiary's claimed employment. *See* Further, the website also reveals that and has collaborated with in the United States, a company in which the beneficiary is a principal. *See* and (accessed August 6, 2013).

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date.

Beyond the decision of the director,[2] on June 18, 2013, the AAO issued a Notice of Intent to Dismiss (NOID) because the petitioner may no longer be operating as an architectural design company. When the petition was filed in December 2012, address was identified as in Pasadena, California. This address also appeared on 2010 federal income tax return (Form 1120S), which identified the business activity as "design." However, on its 2011 federal income tax return (Form 1120S) business activity was identified as a "design, coffee shop" and its address as , in Los Angeles, California. That is still the address of according to online business entity information of the California Secretary of State.

According to a June 2012 article in Architectural Record, the petitioner branched out into the coffee business in 2009 due to a decline of business in the architectural field. In the next three years the petitioner opened six coffee shops. The petitioner's primary, if not exclusive, line of business now appears to be coffee shops. On May 31, 2013, USCIS paid site visits to addresses in Greater Los Angeles that have been associated with . It was determined that in Los Angeles is the petitioners sole shareholder's residential address; in Culver City is the address of the , which the petitioner owns; and that in Pasadena is a commercial address currently occupied by .

In response to the AAO's NOID, counsel submitted a brief, copies of architectural and engineering proposals and photographs of the work-space located at in Los Angeles.

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[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Counsel contends that the location at in Los Angeles is both a residential and commercial property and the photographs reflect that the location has sufficient space to accommodate employment of the beneficiary. The AAO accepts that the petitioner's address is in a building with both residential and commercial space.

Counsel submits a list of projects the petitioner purportedly completed or made bids on in 2009, 2010, 2011, 2012 and 2013. There is no evidence to establish that any of these projects were actually completed or that the petitioner derived any income or work from these projects. While counsel submitted copies of architectural and engineering proposals, none of the proposals are signed by the petitioner and a representative of the proposed client. The record also does not contain other evidence that the petitioner derived sufficient work in the architectural field to warrant the addition of another architect to its business.

In view of the foregoing information, it does not appear that the job offer is *bona fide* as evidence suggests that the petitioner does not intend to employ the beneficiary as an architect, as asserted on the labor certification (ETA Form 9089). A labor certification for a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the ETA Form 9089. *See* 20 C.F.R. § 656.30(c)(2). In the instant proceeding, the ETA Form 9089 specifically states that the job title is "architect" (Part H, box 3). Moreover, the job duties described in Part H, box 11 are exclusively those of an architect.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.